Hovey Electric, Inc. *and* United Construction Workers, Local #18, Christian Labor Association of the United States of America *and* Local 131, International Brotherhood of Electrical Workers, AFL–CIO. Cases 7–CA–40164 and 7–CB–11532

April 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On June 15, 1998, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Rozlyn E. Kelly Esq., for the General Counsel.
David J. Masud, Esq., of Saginaw, Michigan, for the Respondent-Employer.
Curtis R. Witte, Esq., of Grand Rapids, Michigan, for the Respondent-Christian Labor Organization.
Al Moldovan, Organizer, of Kalamazoo, Michigan, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried in Kalamazoo, Michigan, on January 28, 1998. The original charge in Case 7–CA–40164 was filed on August 28, 1997,[1] and first and second amended charges were filed on September 12 and October 17, respectively. The charge in Case 7–CB–11532 was filed on October 14. On October 28, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing (the complaint) based on the above noted charges filed by Local 131, International Brotherhood of Electrical Workers, AFL–CIO (the Charging Party or IBEW), which alleges that Hovey Electric, Inc. (Respondent Hovey or Hovey) has engaged in certain violations of Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act) and United Construction Workers, Local #18, Christian Labor Association of the United States of America (Respondent CLA or CLA) has engaged in certain violations of Section 8(b)(1)(A) and (2) of the Act. Respondent Hovey and Respondent CLA filed timely answers to the complaint, denying that they had committed any violations of the Act.

Issues

The complaint alleges in paragraph 9 that Respondent Hovey engaged in independent violations of Section 8(a)(1) of the Act and in paragraph 15 and 16 that it terminated its employee Gregory Crawford.[2] Additionally, the complaint alleges violations of Section 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act when about August 13, Respondent Hovey granted recognition premised upon Section 9(a) of the Act to Respondent CLA, and entered into and since then has maintained a collective-bargaining agreement with Respondent CLA that includes a union-security clause, withheld from the wages of its employees and transmitted to Respondent CLA dues and initiation fees pursuant to the union-security clause, all at a time when Respondent CLA did not represent a majority of employees in the unit and was not the lawfully recognized exclusive collective-bargaining representative of Respondent Hovey's employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Hovey, is a corporation, engaged in the building and construction industry as an electrical contractor, with offices located in Midland, Portage, and Harbor Beach, Michigan, where it annually provided electrical construction services valued in excess of $50,000 directly to Upjohn Corporation at its facilities located in Portage, Michigan, an employer meeting the Board's direct outflow standard. Respondent Hovey admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that

[1] The judge excluded any testimony regarding the complaint allegations mentioned in fn. 2 of the judge's decision. We find that the testimony was properly excluded on relevancy grounds and therefore the judge did not abuse his discretion in denying the testimony.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the complaint did not allege that the statements attributed to Project Manager Jeff Willi that Respondent Hovey would give wage increases to cover dues and pay initiation fees for employees violated the Act, the General Counsel made no argument to the judge that the statements violated the Act, and there are no exceptions contending that the statements violated the Act.

In adopting the judge's finding that the Respondents entered into a collective-bargaining agreement under Sec. 8(f) of the Act on August 13, 1997, we agree that the judge appropriately considered evidence of the parties' intent with respect to the recognition clause.

In adopting the judge's decision, Member Brame does not rely on *Oklahoma Installation Co.*, 325 NLRB 741 (1998).

[1] All dates are in 1997 unless otherwise indicated.

[2] At the commencement of the hearing, the General Counsel amended the complaint to remove from the affirmative action section the requirement for reinstatement of Gregory Crawford. Accordingly, I approved a non-Board settlement resolving the issues surrounding the termination of Crawford (Jt. Ehx. 1). Additionally, I approved an informal Board settlement with the posting of a notice regarding the independent violations of Sec.8 (a)(1) of the Act (Jt. Ehx. 2). Since pars. 9, 15, 16, 17, and 19(b) of the complaint are encompassed within the settlement agreements, those allegations will not be addressed in the subject decision.

Respondent CLA and the IBEW are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent CLA is a labor union representing approximately 2500 workers throughout the United States. It is an independent union, democratically governed by its membership and is not associated with other labor unions. The CLA is a Christian labor union and through the application of Christian social principles, it promotes the improvement of labor conditions including the protection of workers rights and the elimination of injustices between employer and employees. There are approximately 600 CLA members in the State of Michigan working under 25 collective-bargaining agreements, 20 of which are in the construction industry. Since the CLA does not have jurisdictional boundaries, its members are free to work under the same agreement across Michigan and the United States.

Respondent CLA presently has one 8(f) agreement with a construction industry employer that contains a union-security clause identical to the one in the subject case.[3]

At all material times, Rita Hovey is the president of Respondent Hovey and James Hovey serves as vice president. Mike Koppenol is the national representative for Respondent CLA and Al Moldovan is an organizer for the Charging Party.

B. The Facts

In early February 1997, James Hovey contacted Mike Koppenol to seek information about the CLA. He apprised Koppenol that another contractor in the area, who has a collective-bargaining relationship with the CLA, suggested that he inquire about the organization. After the initial inquiry, Koppenol forwarded a general packet of CLA information to Hovey. In April 1997, Hovey's attorney contacted Koppenol and scheduled a meeting for May 5 at Hovey's facility to further discuss and explore whether the CLA was an appropriate organization to represent Hovey's employees. The meeting took place as scheduled and each of the parties exchanged information about their respective organizations. Thereafter, on June 20, Respondent Hovey forwarded a draft collective-bargaining agreement to Respondent CLA. After June 20, the parties engaged in a number of collective-bargaining sessions in an effort to reach an agreement. One of the issues discussed included a pension plan for Hovey's employees. On July 3, Koppenol sent a letter regarding pension plan contributions to Hovey.[4] Negotiations continued after July 3, and Hovey suggested that the parties enter into an 8(f) contract rather than holding a Board election or immediately agreeing to a 9(a) agreement as favored by the CLA. A compromise was reached to permit the CLA to convert the 8(f) agreement to a 9(a) agreement at anytime in the future and is included in article I of the final collective-bargaining agreement executed by the parties on August 13.[5] It was also agreed to make the collective-bargaining agreement retroactive to April 1, solely to permit Hovey to make a lump sum contribution to the pension plan for each employee based on the hours worked by employees from April 1 to June 30 (G.C. Ehx. 2, art. XXI, sec. 8). The parties' agreement also includes a comprehensive clause concerning union security and financial obligations of employees.[6]

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[3] Sec. 8(f) of the Act authorizes prehire contracts between employees and unions in the building and construction industries. Under Sec. 8(f), an employer may enter into a prehire agreement with a union before a majority of employees has approved the union as its bargaining representative. This sanctioning of prehire agreements is an exception to the general rule of the Act that guarantees employees the right to select their own bargaining representatives. Normally, in industries other than the construction industry, a union must be selected by a majority of the employees within a bargaining unit before that union can have the right to represent employees in the formal bargaining process pursuant to Sec. 9(a). Sec. 8(f) provides in pertinent part that:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged in the building and construction industry with a labor organization of which building and construction employees are members because (1) the majority status of such labor organization has not been establishedunder the provisions of section 9 of the Act prior to the making of such agreement, (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later.

[4] The letter states in pertinent part:

> Upon examination of the CLA pension plan document, the following conditions must be met to accept a contribution to the plan.
>
> 1. Must be a bargaining unit employee covered by a labor agreement.
>
> 2. Must be credited with an hour of service.
>
> 3. Must be a cents per hour provided for in the labor agreement.
>
> The pension contribution can be accomplished by making our signed labor agreement effective back to April 1, 1997. Any pension contribution made right away must be based on hours worked from April 1, 1997 to July 1, 1997. We would also stipulate in the labor agreement a cents per hour contribution from April 1, 1997 to July 1, 1997.

[5] Art. I of the collective-bargaining agreement states that "[s]ubsequent to proof having been submitted to the Employer by the Union that the majority of his employees are members of the Union, the Employer recognizes the Union as the sole bargaining representative of his employees, exclusive of office help, superintendents and foremen having authority to hire and discharge or to effectively recommend such action, in all matters pertaining to their employment and working conditions."

[6] Art. II of the parties agreement states in pertinent part:

> Employer and Union herein exercise their right, under Section 8(a)(3) of the National Labor Relations Act and the laws of Michigan, to agree to the following union security provision.
>
> 1. Every employee covered by this Agreement must, for the life of this Agreement afterthe grace period described in Section 2 below, satisfy an obligation to the Union as the unit's exclusive bargaining representative. Under this Agreement, employees must choose one of the three ways of satisfying this obligation, as described below. Every employee has the right to make the choice free of interference, restraint or coercion.
>
> (a) Full union membership: The employee chooses to join the Union as a full member, is subject to all rights and duties accorded members, and as a condition of employment, must pay the full initiation fee and uniform periodic dues charged by the Union;
>
> (b) Financial core employee: The employee does not become a member of the Union; thus he/she is not entitled to the full range of rights and duties of membership. This employee does not object to the Union's spending part of the dues and fees collected under this Agreement for activities not germane to its role as the unit's exclusive bargaining representative. This employee must pay, as a condition of employment, the full initiation fee and the uniform periodic dues charged by the Union. The Union must

On August 15, representatives of Hovey held a meeting with its employees and announced that a collective-bargaining agreement was executed with Respondent CLA on August 13.

On August 20, after the regularly scheduled weekly safety meeting, Project Manager Jeff Willi met with approximately 20 Hovey employees in the construction trailer on the Upjohn jobsite. Willi told the employees that Hovey planned to give them wage increases in their regularly scheduled August 1997 job evaluations sufficient to cover the CLA dues, and that it would also pay for the CLA initiation fees. Employee Noll Coffinger testified that Willi told the employees, during the August 20 meeting, that they would now be included under a pension plan and also would receive employer provided health benefits. Prior to the execution of the parties' collective-bargaining agreement, employees at Hovey did not enjoy an independent health insurance or pension plan. Rather, Hovey paid the employees an extra dollar an hour to enable them to purchase independent health insurance and an extra 20 cents an hour to apply toward an individual pension plan. Thus, prior to the recognition of the CLA, employees were given an extra $1.20 an hour for health insurance and pension coverage. After the execution of the parties' agreement, the employees were permitted to keep the extra $1.20 an hour.

After the August 20 meeting, Koppenol held two separate meetings with Hovey employees at each of the three work locations to introduce himself and explain the contents of the collective-bargaining agreement. The first set of meetings took place around August 18. Koppenol distributed a copy of the signed collective-bargaining agreement to each employee and explained each article and how it would affect the employees. Additionally, a detailed explanation of the union-security clause and the three different ways that employees could satisfy their obligations was covered at these meetings. The second set of meetings commenced around August 26, and in addition to continued discussions about the ramifications of the collective-bargaining agreement, the employees executed CLA membership and dues authorization cards (R. Ehx. 2). By letter dated September 11, Koppenol advised Hovey that a majority of its employees signed cards designating CLA as their collective-bargaining representative. The CLA requested exclusive recognition and apprised Hovey that it stood ready to prove its majority status by submitting the signed membership cards to a mutually selected impartial person. On September 17, Hovey acknowledged the CLA's demand and indicated that it presumed it was in accordance with article I of the parties' collective-bargaining agreement. It further stated, "[T]o the extent that Hovey Electric, Inc., is contractually bound to recognize the Christian Labor Association as a Section 9(a) representative only 'subsequent to proof having been submitted to the Employer by the Union that the majority of his employees are members of the Union,' we do indeed require independent verification of the union's claim." For this purpose, Hovey suggested that Federal Mediator Donald Power be contacted and upon verification by Mediator Power, it would consider the claim under article I of the collective-bargaining agreement to be satisfied. On October 16, the parties provided Mediator Power with a list of Hovey employees and their executed membership cards. Mediator Power confirmed by letter of the same date, that the CLA demonstrated a majority showing of interest and qualifies as the exclusive collective-bargaining representative of Hovey employees.

C. Analysis

The General Counsel alleges in paragraphs 10 through 14 of the complaint that Respondent Hovey and Respondent CLA entered into a collective-bargaining agreement on August 13, at a time when Respondent CLA did not represent a majority of employees in the unit and was not the lawfully recognized exclusive collective-bargaining representative. Additionally, the General Counsel asserts that the parties' collective-bargaining agreement contains an effective date of April 1, and a union-security clause requiring employees to pay dues and fees on the 13th day after the effective date for which Respondent Hovey withheld wages of its employees and transmitted to Respondent CLA dues and initiation fees.

Respondent Hovey and Respondent CLA opine that they entered into a legitimate 8(f) prehire construction industry agreement which contains a unique provision giving employees a period of 30 rather then 7 days under the union-security clause to make a decision as to how they are going to satisfy their obligations to the CLA. It was only after the completion of good-faith negotiations that the 8(f) agreement was signed, and in accordance with article I, the CLA was given an opportunity to make a demand for 9(a) recognition. Under these circumstances, Respondent Hovey and Respondent CLA argue that the Act has not been violated.

The Board held under *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub. nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), and *Brannan Sand & Gravel Co.,* 289 NLRB 977 (1988), that a collective-bargaining relationship in the construction industry is presumed to be Section 8(f) rather than Section 9(a) and the party asserting a 9(a) relationship bears the burden of proving such relationship exists. Further, in *J & R Tile,* 291 NLRB 1034, 1036 (1988), the Board

provide the employee with information to enable him/her to decide whether to object to the use of his/her dues for nonrepresentation expenditures.

(c) Proportionate share payer: The employee does not become a full member of the Union and, thus, is not entitled to the full range of rights and duties of union membership; further, the employee informs the Union that he/she objects to the Union's spending part of the dues and fees collected under this Agreement for activities not germane to its role as the exclusive bargaining representative; this employee must, as a condition of continued employment, pay the percentage of fees and uniform periodic dues used for activities germane to the Union's status as the unit's exclusive bargaining representative. The Union must provide this employee with information about its expenditures and this employee may challenge the Union's information.

(2) Each employee covered by this Agreement who is not a full member of the Union on the effective date of this Agreement, has the right to a "grace period" of twenty-nine (29) days in which to choose his/her status. Thus:

(a) For all employees who are in the unit and are not full Union members on the effective date of this Agreement, their chosen status and their obligation to pay dues and fees, shall begin on the thirtieth day after the effective date of this Agreement.

(b) For all new employees who are hired into the unit during this Agreement's life, their chosen status, and their obligation to pay dues and fees, shall also begin on the thirtieth day after their date of hire.

(3) Employees in the unit who are full Union members on this Agreement's effective date or, if hired during this Agreement's life, on their date of hire, do not receive the grace period: For these full Union members, their obligation to the Union is continuous and is not affected by this Agreement, although they are free to change their status.

held that, to establish voluntary recognition, there must be positive evidence that a union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such. In this regard, a union can establish that it is the 9(a) representative by showing its express demand for, and an employer's voluntary grant of recognition to the Union as the bargaining representative, based on a contemporaneous showing of support by a majority of employees in the appropriate unit, e.g., a valid card majority. See *Goodless Electric Co.,* 321 NLRB 64 (1996), enfd. denied 124 F.3d 322 (1st Cir. 1997).

Applying the forgoing to the instant case establishes that the CLA made a demand for recognition after having obtained a showing of support by a majority of employees in the unit, and Hovey voluntarily granted recognition. In this regard, after Koppenol met individually with Hovey employees at their respective work locations and a majority of those employees signed CLA authorization cards, he requested recognition from Hovey by letter dated September 11. On September 17, Hovey acknowledged the request for recognition and suggested that independent verification of the CLA's claim be undertaken. For that purpose, Federal Mediator Donald Power was mutually selected and on October 16, Mediator Power certified that after a review of the CLA authorization cards, a significant showing of interest was established and the CLA was the exclusive bargaining representative of Hovey's employees.

Contrary to the General Counsel and in agreement with Respondent Hovey and Respondent CLA, I find that under all the circumstances presented, the weight of the evidence conclusively shows a clear intent of the parties to establish a 9(a) relationship founded on the CLA's majority status.[7] Therefore, I find that the allegation in paragraph 10 of the complaint that Respondent Hovey granted recognition to Respondent CLA on August 13 premised upon Section 9(a) of the Act, is not supported by the record evidence. Rather, I find that that the parties' August 13 collective-bargaining agreement was entered into and maintained under Section 8(f) of the Act and remained an 8(f) agreement until October 16, when Respondent CLA became the 9(a) exclusive representative of Hovey's employees. See *Okalhoma Installation Co.,* 325 NLRB 741 (1998).

The General Counsel further argues in paragraph 11 of the complaint that the parties' collective-bargaining agreement contains an effective date of April 1, and a union-security clause requiring employees to pay dues and fees beginning on the 13th day after the effective date of the Agreement.

I find that backdating the effective date of the parties' collective-bargaining agreement was undertaken solely to satisfy the requirement of Hovey making a lump sum contribution to the pension plan based on hours worked by employees from April 1 to June 30. Thus, I conclude that it was not until August 13, that the parties' executed the collective-bargaining agreement and all provisions contained therein were based on Section 8(f) of the Act. As I found earlier, it was not until October 16, that the CLA lawfully converted their 8(f) agreement to one under Section 9(a) pursuant to the procedure for voluntary recognition outlined by the Board and the court of appeals in *Goodless,* supra.

Likewise, I find nothing in Section 8(f) of the Act that prohibits a period greater then 7 days to require membership in a labor organization as a condition of employment. See *Luke Construction Co.,* 211 NLRB 602 (1974) (Board found that a 12-day grace period was lawful and held the employer violated the Act for denying employees the benefit of the full 12-day grace period provided in the union-security clause of the parties' 8(f) agreement). Therefore, I conclude that the union-security clause in article II, section 2(a) of the parties' agreement that requires the payment of dues and fees beginning on the 13th day after the effective date of the Agreement, not to be violative of the Act. Indeed, the evidence shows that it was not until August 30 that Respondent Hovey withheld from the wages of its employees and transmitted to Respondent CLA dues and initiation fees pursuant to the union-security clause.

For all the above reasons, I find that the parties' relationship is lawfully governed by Section 9(a) of the Act. Thus, I conclude that Hovey and the CLA lawfully converted their 8(f) agreement to a 9(a) agreement in full accordance with the requirements for voluntary recognition outlined by the Board in *Deklewa* and *Goodless,* supra. I therefore find that the collective-bargaining agreement in existence between the parties is a legitimate exercise of collective bargaining and find that Respondent Hovey did not engage in violations of Section 8(a)(1), (2), and (3) of the Act and that Respondent CLA did not engage in violations of Section 8(b)(1)(A) and (2) of the Act.

CONCLUSIONS OF LAW

1. Respondent Hovey is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent CLA and IBEW are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Hovey did not render unlawful assistance and support to a labor organization in violation of Section 8(a)(1) and (2) of the Act nor did it discriminate in regard to hire or tenure or terms and conditions of employment of its employees, thereby encouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

4. Respondent CLA did not restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act nor did it attempt to cause and cause Respondent Hovey to discriminate against its employees in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act.

[7] The General Counsel introduced evidence that Respondent Hovey, on August 20, offered to provide extra wages to their employees to cover the CLA's dues and initiation fees in order to support its argument that Respondent Hovey has been rendering unlawful assistance and support to Respondent CLA in violation of Sec. 8(a)(1) and (2) of the Act. I reject this argument as employee Noll Coffinger testified that Hovey employees were able to keep the extra $1.20 an hour that previously was provided to employees to purchase their own health insurance and contribute toward an individual pension plan. Thus, I conclude that money already given to employees was used to offset the CLA's dues and initiation fees and extra money was not independently provided to employees for this purpose. Accordingly, Respondent Hovey did not render unlawful assistance and support to Respondent CLA in violation of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.